STATE OF MICHIGAN

COURT OF APPEALS

ALFRED MILLER,

Plaintiff-Appellant,

v

PULMONARY & INTERNAL MEDICINE SPECIALISTS, P.C.,

Defendant,

and

NORTHWESTERN TRIANGLE COMPANY, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
April 15, 2014

No. 314067
Oakland Circuit Court
LC No. 2011-122816-NO

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant[1] pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

This action arises out of injuries sustained by plaintiff when he slipped and fell on "black ice" at a medical office building operated by defendant. Plaintiff arrived at the building at 9:00 p.m. on December 29, 2010. According to plaintiff, both the parking lot and the sidewalk were free of ice and snow when he arrived. Plaintiff spent the night at the building as a participant in a sleep study. The next morning, plaintiff proceeded to leave the building at approximately 6:45 a.m. According to plaintiff, after taking a couple of steps on the sidewalk, he slipped on some ice. Plaintiff stated that he was looking at the sidewalk as he walked and it appeared to be clear. He described the ice as "transparent." A sleep technician who accompanied plaintiff outside the building similarly stated that she did not see any ice on the sidewalk before plaintiff fell.

[1] Our use of "defendant" throughout this opinion will refer to the appellee, Northwestern Triangle Company, L.L.C.

Defendant moved for summary disposition under MCR 2.116(C)(10), contending that there was no evidence that it had actual or constructive notice of the icy condition before plaintiff's fall. The trial court agreed and granted defendant's motion.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a motion under MCR 2.116(C)(10) by considering the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.*; *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). The duty a landowner owes to those who enter his or her land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespassers, licensees, and invitees. *Id.* The parties do not dispute that plaintiff was a business invitee while on defendant's premises. "With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (footnote omitted).

But a landowner only owes an invitee a duty to protect if the landowner has actual notice of the hazard or if the landowner would have discovered the hazard with the exercise of reasonable care. *Id.*; *Stitt*, 462 Mich at 597. Here, there is no evidence to show that defendant had actual knowledge of the patch of ice. Thus, the dispositive inquiry is whether defendant had constructive notice of the hazard. A landowner's constructive notice of a condition is established if, from the evidence, the condition is of such a character, or has existed for a sufficient length of time, that the landowner should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). But circumstantial evidence that weather conditions were conducive to producing ice does not allow a reasonable inference that a defendant had constructive notice of the ice. *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999).

Here, there was no evidence submitted that would allow a reasonable juror to conclude that defendant should have discovered the patch of black ice with the exercise of reasonable care. It would not be reasonable to expect a defendant to inspect every square inch of its premises in the search for virtually invisible hazards. Moreover, plaintiff's own testimony establishes that there was nothing to indicate the presence of the ice. As such, there was nothing to prompt any additional or focused inspections to search in the middle of the night for virtually invisible ice that was unknown to exist.

Plaintiff's reliance on *Clark*, 465 Mich 416, to argue that the icy condition existed for a sufficient length of time that defendant should have had constructive notice of the condition is misplaced. In *Clark*, the plaintiff slipped and fell on smashed grapes on the floor of a closed checkout lane. The evidence did not reveal precisely how long the grapes had been on the floor, but evidence was presented that the checkout lane had been closed for an hour before the plaintiff slipped and fell. *Id.* at 420. The Michigan Supreme Court reasoned:

> Given that evidence, a jury could reasonably infer that the loose grapes were, more likely than not, dropped when a customer brought the grapes to the checkout lane to buy them while it was still open. From this, the jury could infer that an employee of defendant should have noticed the grapes at some point before or during the closing of the lane and either cleaned them up, or asked another employee to do so. Further, the fact that the checkout lane had been closed for about an hour before plaintiff fell establishes a sufficient length of time that the jury could infer that defendant should have discovered and rectified the condition. [*Id.*]

Clark is distinguishable from this case because it involved evidence that a hazardous condition, which would have been visible and identifiable upon a reasonable inspection, actually existed for at least an hour before the plaintiff fell. Conversely, the evidence in this case shows that the ice on which plaintiff fell was not visible. In his deposition, plaintiff described the ice as "transparent" and testified that he was only able to see the ice when he was lying on the ground. The sleep technician who accompanied plaintiff outside similarly stated that she did not see the ice when plaintiff walked outside. Thus, unlike the clearly visible grapes in *Clark*, the nature of the icy condition was not such that defendant should have been expected to notice it.

Furthermore, plaintiff's reliance on a meteorologist's affidavit that stated that the ice "would have begun developing between 2:00 and 3:00 a.m." is misplaced. As noted earlier, circumstantial evidence that ice may have formed under weather conditions that existed at the time of a fall do not allow a reasonable inference that a defendant had constructive notice of an actual icy or dangerous condition. *Altairi*, 235 Mich App at 640. As the *Altairi* Court noted, "Insofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known that ice lay under the snow on his steps, the same knowledge can be imputed to plaintiff." *Id.*

Therefore, because there was no evidence to support a conclusion that the black ice was "of such a character or has existed a sufficient length of time," such that defendant should have had knowledge of it, *Clark*, 465 Mich at 419, the trial court did not err in granting summary disposition on this ground.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen